Court of Appeals, State of Michigan

ORDER

Nancy E Summers v Carter's Inc

Docket No. 255028

LC No. 03-000518-NO

David H. Sawyer
Presiding Judge

Michael J. Talbot

Stephen L. Borrello
Judges

On the Court's own motion, the opinion issued September 27, 2005, in this case is AMENDED to add the bolded word as follows in the fourth full paragraph on page 3:

> "Here, the court correctly concluded that there were no special aspects causing the plastic wrap to be unreasonably dangerous. Our review of the record indicates that the plastic wrap did **not** create an 'unreasonable risk of harm.' *Laier, supra* at 496. Accordingly, the trial court did not abuse its discretion when it denied plaintiffs' motion to amend."

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

OCT 06 2005
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

NANCY E. SUMMERS and WILLIAM SUMMERS,

Plaintiffs-Appellants,

v

CARTER'S INC., d/b/a CARTER'S CENTER and NORTHERN SUPERMARKETS INC., d/b/a CARTER'S FOOD CENTER,

Defendants-Appellees.

UNPUBLISHED
September 27, 2005

No. 255028
Iosco Circuit Court
LC No. 03-000518-NO

Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

In this premises liability action, plaintiffs appeal by right from orders of the trial court granting defendants' motion for summary disposition under MCR 2.116(C)(10) and denying plaintiffs' motion to file an amended complaint pursuant to MCR 2.118(A)(2) and MCR 2.206(A)(2)(a). This action stems from plaintiff Nancy Summers' trip and fall in an aisle of a grocery store. Nancy Summers tripped over some plastic wrap used to package ice cream, causing injury. We affirm.

Plaintiffs first argue that the trial court erred in granting defendants' motion for summary disposition. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). In reviewing a motion for summary disposition under MCR 2.116(C)(10), the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Plaintiff was a business invitee on defendant's property. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 598-599; 614 NW2d 88 (2000). A landowner owes a duty to an invitee to exercise reasonable care to protect the invitee from unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629

NW2d 384 (2001). This duty does not encompass open and obvious dangers unless special aspects of the condition make the risk unreasonably dangerous. *Id.* An alleged dangerous condition is open and obvious if an average user with ordinary intelligence would have been able to discover the danger and the risk presented on casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002).

While we sympathize with the plight of plaintiff, we are bound to follow the dictates of our Supreme Court and the earlier rulings of this Court which clearly state that the danger posed by the plastic wrap was open and obvious. Dangers that are readily visible such as an ordinary pothole, steps, and ordinary debris have consistently been held to be open and obvious. See, e.g., *Lugo*, *supra* at 520; *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1997). That Nancy Summers herself did not see the plastic wrap she allegedly tripped over is irrelevant because the test for an open and obvious danger is an objective one. *Hughes v PMG Building, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). William Summers' testimony indicates that the plastic was approximately five feet in length and readily visible and distinguishable from the floor. Moreover, the deposition testimony does not indicate that William Summers was in a position to have a superior view of the aisle in which his wife fell. Accordingly, we conclude that casual inspection would readily reveal such a large section of plastic.

Further, there are no special aspects of the plastic wrap that make the risk of harm unreasonably high. In *Lugo*, the Court noted that an "open and obvious condition might be unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm." *Lugo*, *supra* at 517. If such special aspects exist, a premises owner can be liable despite the open and obvious nature of the condition. *Id*. at 519. In *Lugo*, the Court provided two examples of open and obvious conditions that are unreasonably dangerous: a condition creating a risk of death or serious harm such as a thirty-foot pit in a parking lot, or a condition that is unavoidable such as floor in a commercial building where the only route to exit is covered in standing water. *Id*. at 518. The plastic wrap is not like either of these examples. The danger of tripping posed does not create a risk of serious injury or death. Moreover, the plastic was readily avoidable. Nancy Summers could have easily moved it to avoid the danger (just as William Summers moved it when he came to her aid) or could have avoided the alleged danger by proceeding through a different aisle altogether.

Additionally, plaintiffs' suggestion that the distraction created by product displays created a special aspect is without merit. Our Supreme Court in *Lugo* rejected an analogous argument: "While plaintiff argues that moving vehicles in the parking lot were a distraction, there is certainly nothing 'unusual' about vehicles being driven in a parking lot, and, accordingly, this is not a factor that removes this case from the open and obvious danger doctrine." *Lugo*, *supra* at 522. Similarly, there is nothing unusual about displays of products in grocery stores.

Next, plaintiffs argue that the trial court erred in denying their motion for leave to file an amended complaint. We disagree. A trial court's decision to grant or deny leave to amend a complaint is reviewed for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Leave to amend a complaint should be freely given when justice so requires. MCR 2.118(A)(2); *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 696; 588 NW2d 715 (1998). "Ordinarily, a motion to amend a complaint should be granted, and should be denied only for the following particularized reasons: (1) undue delay, (2) bad faith or dilatory

motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of the amendment." *Lane*, *supra* at 697.

Plaintiffs requested permission to amend their complaint by adding as a party the grocery store employee who was allegedly stocking the ice cream on the day of the accident. Plaintiffs wanted to add a theory of liability based on ordinary negligence and respondeat superior. The court denied plaintiffs' motion because it concluded that amendment would be futile.

Plaintiffs argue in part that the court erred in relying on the open and obvious doctrine in denying their motion to amend. This Court recently concluded that the open and obvious danger doctrine does not apply to an ordinary negligence claim. *Laier v Kitchen*, 266 Mich App 482, 484, 502; ___ NW2d ___ (2005) (Neff, J.; Hoekstra, J., concurring in part and dissenting in part). If the court in the case at bar relied on the open and obvious doctrine in denying plaintiff's motion, the court erred. However, it is unclear from the record whether the court actually relied on the open and obvious doctrine when denying the motion.

Nonetheless, we believe that the court did not abuse its discretion in denying the motion because plaintiffs failed to allege facts indicating that the employee owed them a duty. "Duty can arise from a statute or a contract or by application of the basic rule of common law, which imposes an obligation to use care or to act so as to not unreasonably endanger the person or property of others." *Hampton v Waste Mgt*, 236 Mich App 598, 602; 601 NW2d 172 (1999). "Duty is a legally recognized obligation to conform to a particular standard of conduct to protect others against an unreasonable risk of harm." *Laier*, *supra* at 496. "In determining whether to impose a duty, this Court evaluates factors such as: the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). "Ordinarily, whether a duty exists is a question of law for the court." *Id*. However, "[i]f the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995).

Here, the court correctly concluded that there were no special aspects causing the plastic wrap to be unreasonably dangerous. Our review of the record indicates that the plastic wrap did create an "unreasonable risk of harm." *Laier*, *supra* at 496. Accordingly, the trial court did not abuse its discretion when it denied plaintiffs' motion to amend.

Finally, plaintiffs argue that summary disposition was prematurely granted before discovery was completed. Again, we disagree. A motion for summary disposition under MCR 2.116(C)(10) is premature if discovery has not closed, unless there is no fair likelihood that further discovery would yield support from the nonmoving party's position. *Ensink v Mecosta County Gen Hosp*, 262 Mich App 518, 540; 687 NW2d 143. A party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence. *Hyde v Univ of Michigan Bd of Regents*, 226 Mich App 511, 519; 575 NW2d 37 (1997). Beyond asserting that summary disposition was premature, the plaintiffs did not present the trial court with anything to suggest how future discovery would have made a difference to the survival of their claim. Plaintiffs failed to identify any disputed issues and failed to support their allegations that a dispute exists with independent evidence. In other words, plaintiffs' assertion amounts to speculation.

Therefore, there is no merit to plaintiffs' claim that the trial court's summary disposition ruling was premature.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Talbot
/s/ Stephen L. Borrello